Petition

81-1898

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1981

KENNETH BREWER, PETITIONER

-vs-

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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London, Kentucky 40741
(606) 864-2252

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OF THE UNITED STATES

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KENNETH BREWER, PETITIONER

-vs-

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PETITION FOR WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

_____

Petitioner, Kenneth Brewer, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on the 17th day of February, 1982.

QUESTIONS PRESENTED

Whether the District Court deprived Mr. Brewer of his right to due process of law by allowing the prosecution to introduce a tape recording wherein a portion thereof had been deliberately erased by agents for the Federal Bureau of Investigation and, then, not allowing Mr. Brewer, who was depending on the defense of entrapment, to present that portion of the erased tape to the jury or comment thereon because it occurred after the arrest of the defendant-appellant-petitioner, Kenneth Brewer and further, by allowing a one-sided tape recording of an FBI informant to be introduced, the FBI informant alleging it to be a conversation with Mr. Kenneth Brewer, said conversation containing only the voice of the FBI informant.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States District Court for the Eastern District of Kentucky at London were

Patrick Malley, United States Attorney for the Eastern District of Kentucky by and through Assistants Barbara Edelmen and Tom Self for the United States of America as respondent-appellee-plaintiff and Kenneth Brewer petitioner-appellant-defendant.

TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the Court of Appeals below is recorded in the Appendix herein. The opinion from the District Court can be found at page _____ in the Appendix herein.

JURISDICTION

The judgment of the Court below was entered on the 17th day of February, 1982. Re-hearing was not sought. An application to the Court below was made to stay its mandate pending the filing of a Petition for Writ of Certiorari and a final determination thereon by this Court.

This motion for stay of mandate was made on the 5th day of March, 1982, and as yet has not been ruled on by the Sixth Circuit Court of Appeals. The jurisdiction of this in Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth and Fourteenth Amendment Section 1 to the Constitution of the United States which provide:

The Congress, whenever two two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution,or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article: and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. The statute under which the petitioner was arrested and prosecuted was 18 U.S.C. 1951, which provides as follows:

> Interference with commerce by threats or violence
> (a) Whoever in any way or decree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
> (b) As used in this section--
> (1) the term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of

anyone in his company at the time of the taking or obtaining.
(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

The defendant-appellant-petitioner, Kenneth Brewer, herein after referred to as Mr. Brewer, a restaurant owner in the small mountain community of McKee, Kentucky, and school board member for the Jackson County Board of Education is seeking a Writ of Certiorari requesting this Court to hear and reverse the decision of the Sixth Circuit Court of Appeals entered on the 17th day of February, 1982, affirming a judgment entered

on the 8th day of September, 1980, by the Honorable Eugene E. Siler, Judge of the United States District Court for the Eastern District of Kentucky.

In the district court proceeding Mr. Brewer was adjudged guilty of criminal indictment no. 80-5, an indictment containing two counts. Mr. Brewer was sentenced on count one to four years of imprisonment and a fine of $2,500.00 and on count two to four years imprisonment, the sentences to run concurrently. This indictment charged Mr. Brewer with violation of Title 18 U.S.C. Section 1951 "racketeering. Interference with commerce with threats of violence". This section is often known as "the Hobbs Acts."

Mr. Brewer contends that he was deprived of his fifth and fourteenth amendment rights to due process of law by the actions of the district court as is set out in the statement of the question presented.

The relevent facts, which are material to the consideration of the question pre-

sented are as follows:

According to defense testimony in February, 1980, Mr. Truman Hays, an FBI informant, approached Mr. Kenneth Brewer, a school board member with a scheme that he, Mr. Hays, had a contractor who was willing to give kick-backs on public contracts - there being bids to be let for the construction of a new school in Jackson County, Kentucky. Mr. Brewer agreed to help Mr. Hays as a friend, because he knew that Mr. Hays was in financial trouble.

Mr. Hays, the FBI informant, testified that the plans for contractual kick-backs did not begin with him.

After enlisting the aid of a construction company, the FBI and their informant implemented the plan for kick-backs wherein an offer to pay for the control of the outcome of the bidding on contracts was made. Cash money was offered to the defendants who refused the inducement.

The plan was temporarily abandoned by the bureau and their informant but later

inducements were made by Mr. Hays during which time Mr. Hays taped a telephone conversation wherein he only his side of the conversation and not the party with whom he was talking. This tape was allowed to be introduced into evidence over the strenuous objection for the attorney for Mr. Brewer. Later, actual payment was made to the defendants after more inducement whereupon the defendant-appellant-petitioner and the co-defendant were arrested alleging a Hobbs Act violation which has become to be known as "the smallest abscam".

During the payment of the alleged bribe and arrest, tapes were made by body recorders by the informant Hays said recorder being left on some few minutes after the arrest.

At one point prior to the trial, the prosecution through its counsel approached the defense counsel and told defense counsel that an FBI tape expert had erased a portion of the tape of the arrest and request that this revelation not be mentioned to the defendant nor to the Court.

The defendants, of course, owing a duty to their clients, move to dismiss the case against the defendants alleging that manifest and justice was done and that under our judicial system based on fair play, this indictment should be dismissed and/or the tape excluded from evidence.

The Court ruled that the motion to dismiss should be overruled and that the tape could be used in evidence.

Whats more, and most importantly, the Court ruled that the defense could not comment on the erasure or introduce the erased portion to the jury stating that after a hearing where only FBI agents testified, the excised conversation did not relate to the criminal investigation.

The defendant Brewer alleged that since his defense was to be entrapment, exculpatory materials could have been within that eleven second erasure.

As was stated before,Mr. Brewer was convicted, appealed the case to the Sixth

Circuit Court of Appeals, said decision being affirmed on the 17th day of February, 1982, to which we now seek certiorari.

The United States District Court for the Eastern District of Kentucky, claimed jurisdiction of this case through the "Hobbs Act" (18 U.S.C. 1951) by virtue of the fact that materials to be used in the construction of the school by the Jackson County School Board were to travel in interstate commerce.

ARGUMENT AND REASON FOR ALLOWING THE WRIT

The petitioner Brewer feels that the Sixth Circuit Court of Appeals has decided a question of law which has not been but should be settled by this Court and differentiates the decision in his case from other decisions heretofore rendered by Courts of Appeals and the Supreme Court by stating the Supreme Court of the United States has not decided a case which combines both the element of willful misconduct in the erasure of the tape or destruction of any type of evidence along with the claimed defense of entrapment

in a "abscam case" which lends itself so well to the possibility of entrapment and denying the rights of the parties entrapped.

The decision of the Sixth Circuit Court of Appeals in an unusual twist is contra to the dictum of the Ninth Circuit case of the United States -vs- Heiden, 508 F 2d, 899 (Ninth Circuit 1974) wherein the Court stated "(W)hen there is a loss or destruction of such evidence, we will reverse the defendant's conviction (Emphasis added) is he can show (1) bad faith or connivance on the part of the government or (2) that he was prejudice by the loss of the evidence." Also by dictum the Seventh Circuit decided, United States -vs- Rose, 590 F 2d 232, (Seventh Circuit 1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 Lawyers Addition 2d 297 (1979). . . . "It may be, though we do not now so decide, that intentional wrongful misconduct on the part of the Government would warrant an assumption that the evidence destroyed would have been favorable to the defense. (Emphasis supplied.)

From the foregoing, where the Court finds that there exists the possibility that the deliberate destruction of evidence may have, in fact, destroyed key information that could possibly vindicate the accused, convictions are overturned. The evidence in the instant case, coupled with the prosecutions attempt to try to cover up the erasure, should be seriously considered as reason that dictates a reversal of Mr. Brewer's conviction.

Although the government on one hand claims to be skilled in the process of taping and having skilled agents, they, then introduced a tape in which the only recognizable communication was that of a paid government informer. Of course, such one-sided tape would be self-serving testimony to the prosecution. The defendant strenuously objected and allege that the Court should be consistent, that is if the trial court were to allow the introduction into evidence of the one-sided taped conversation, then, it should have allowed the defendant to introduce testimony,

tapes and comments relative to the erasure of the tapes by the FBI experts. Thusly, the defendant would be insured his rights of due process and the Court would be defining the responsibilities of the prosecution in future cases of willful destruction of evidence.

CONCLUSION

The judgment below is unique and a departure from the dictum of other cases wherein no guide lines have been solidified by the Supreme Court of the United States, therefore it is respectivefully submitted that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,
ROBERT E. CATO
Attorney at Law
222 West Fifth Street
London, Kentucky 40741
(606) 864-2252

BY:
ROBERT E. CATO
Attorney for Petitioner, Kenneth Brewer

Appendix

APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

UNITED STATES OF AMERICA

-vs- INDICTMENT NO. 80-5
T. 18, U.S.C. 1951)

OTIS JOHNSON
ZACK T. BANKS
KENNETH BREWER and
CHARLES D. MARCUM

COUNT I

THE GRAND JURY CHARGES:

1. At all times pertinent hereto, defendants Otis Johnson, Zack T. Banks and Kenneth Brewer were members of the Jackson County Kentucky School Board.

2. At all times pertinent hereto, the Jackson County School Board had authority to let certain construction contracts for publicly funded projects in Jackson County, Kentucky.

3. At all times pertinent hereto, W. B. Browning Construction Company, a Kentucy corporation, with its principle place of business in Pineville, Kentucky, was engaged in the general contracting business in interstate commerce.

4. At all times pertinent hereto, Jerry Browning was principal operating officer and owner of W. B. Browning Construction Company.

5. The terms "extortion" and "commerce" are those defined in Title 18, United States Code, Section 1951.

6. Between, on or about the 20th day of November, 1979, and up to and including the date of the return of this indictment, in Jackson County, Kentucky, and other locations in the Eastern District of Kentucky,

OTIS JOHNSON
ZACK T. BANKS
KENNETH BREWER and
CHARLES D. MARCUM

did knowingly, wilfully and unlawfully conspire and agree together and each with the other to obstruct, delay and affect commerce by extortion, in that the defendants conspired to obtain the sum of $55,000.00, which was not due to them or to the Jackson County School Board, from W. B. Browning Construction Company and Jerry Browning, with the consent of said W. B. Browning Construction Company and Jerry Browning, said consent being induced under the color of official right of the Jackson County School Board.

6. Specifically, it was part of said conspiracy that the defendants would obtain said $55,000.00 from W. B. Browning Construction Company in return for which defendants would guarantee that said construction company would receive certain con-

struction contracts to be let by the Jackson County School Board outside of and in violation of, the legally required competitive bidding process.

OVERT ACTS

At the times and places hereinafter mentioned, the defendants committed the following and other overt acts in furtherance of said conspiracy and to affect the objectives thereof:

1. On or about November 20, 1979, defendant, Charles D. Marcum, did have a discussion with Truman Hays, a resident of Jackson County, Kentucky, regarding access to certain coal reserves owned by Hays.

2. On or about February 2, 1980, defendant, Kenneth Brewer, had a discussion with Truman Hays regarding access to certain coal reserves owned by Hays.

3. On or about February 8, 1980, defendants, Kenneth Brewer and Otis Johnson,

did have a discussion with Truman Hays about finding a contractor willing to make payoffs in order to obtain certain contracts to be let by the Jackson County School Board.

4. On or about February 9, 1980, defendant, Charles D. Marcum, did have a discussion with Truman Hays regarding access to certain coal reserves owned by Hays and about Hays providing a contractor willing to make payoffs in order to obtain certain contracts to be let by the Jackson County School Board.

5. On or about February 14, 1980, defendant, Kenneth Brewer did have a discussion with Truman Hays regarding a payoff to be made by W. B. Browning Construction Company.

6. On or about February 15, 1980, defendants Kenneth Brewer, Charles D.

Marcum and Zack T. Banks did have a discussion with Truman Hays regarding a payoff to be made by W. B. Browning Construction Company.

7. On or about February 15, 1980 defendant Kenneth Brewer, Charles D. Marcum and Zack T. Banks did meet with Jerry Browning, a principal operating officer and owner of W. B. Browning Construction Company, Special Agent John Gill of the Federal Bureau of Investigation (representing himself to be Larry Browning of W. B. Browning Construction Company) and Truman Hays. The parties at said meeting did discuss W. B. Browning Construction Company making a payment of a sum of money to the defendants in exchange for a certain construction contract to be let by the Jackson County School Board.

8. On or about February 19, 1980, defendant Charles D. Marcum did have a discussion with Jerry Browning, of W. B. Browning Construction Company, regarding bids to be submitted by W. B. Browning Construction Company on certain contracts to be let by the Jackson County School Board.

9. On or about March 2, 1980, defendant, Kenneth Brewer did have a discussion with Truman Hays regarding the bids submitted to the Jackson County School Board on a certain construction project.

10. On or about March 3, 1980, defendant Kenneth Brewer did have a discussion with Truman Hays regarding the bid to be submitted by W. B. Browning Construction Company for a certain construction contract to be let by the Jackson County School Board.

11. On or about March 3, 1980,

defendant, Kenneth Brewer and Charles D. Marcum did discuss with Truman Hays the proposed payoff by W. B. Browning Construction Company, and a meeting to be held on March 4, 1980.

12. On or about March 4, 1980, defendants Kenneth Brewer and Charles D. Marcum did meet with Truman Hays and Special Agent John Gill (representing himself to be Larry Browning of W. B. Browning Construction Company), at which meeting it was discussed that W. B. Browning would pay the sum of $55,000.00 to the defendants in exchange for the guarantee of certain contracts to be let by Jackson County School Board.

13. At that meeting mentioned above in overt act 12, Special Agent Gill did pay to the defendants, represented by Kenneth Brewer and Charles D. Marcum, the sum of $5,000.00 in cash.

All in violation of Title 18, United States Code, Section 1951.

COUNT 2

THE GRAND JURY FURTHER CHARGES:

1. Paragraphs 1 through 5 of Count 1 are hereby relalleged and incorporated as if set forth in full herein.

2. That from on or about the 20th day of November, 1979, up to and including the date of return of this indictment, in Jackson County, Kentucky and other locations in the Eastern District of Kentucky,

OTIS JOHNSON
ZACK T. BANKS
KENNETH BREWER and
CHARLES D. MARCUM

did knowingly, unlawfully and wilfully attempt to obstruct, delay and affect commerce by extortion, in that the defendants did attempt to obtain property in the amount of $55,000.00 cash, which was not due to them or to the Jackson County School Board, from W. B. Browning Construction Company and Jerry Browning, with the consent of said W. B. Browning Construction Company and

Jerry Browning, said consent being induced under the color of official right of the Jackson County School Board, in violation of Title 18, United States Code, Section 1951.

A TRUE BILL

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FOREMAN

/s/ Patrick H. Molloy
PATRICK H. MOLLOY
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON
DOCKET NO. 80-5

UNITED STATES OF AMERICA, PLAINTIFF

-vs- JUDGMENT AND PROBATION/COMMITMENT ORDER

KENNETH BREWER, DEFENDANT

In the presence of the attorney for the government the defendant appeared in person on this date, August 29, 1980, with counsel, Robert E. Cato.

There being a verdict of guilty on Counts 1 and 2, wherein the defendant has been convicted as charged of the offense of Extortion, in violation of Title 18, Section 1951, United States Code.

The court asked whether defendant had anything to say why judgment should not be promounced. Because nó sufficient cause to the contrary was shown, or appeared to the court, the court aujudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 1 - Four (4) years - Fine - $2,500.00, Count 2 - Four (4) years.

IT IS ADJUDGED that the above sentence shall be served pursuant to Title 18, United States Code, Section 4205 (b) (1), and the defendant shall become eligible for parole upon serving eight (8) months.

Sentences are to be served concurrently.

A presentence report was submitted to the Court before imposition of sentence and copies of the report were furnished to counsel pursuant to Rule 32, F.R.C.P.

SIGNED BY:

_____

EUGENE E. SILER, JR., JUDGE

CERTIFIED AS TRUE COPY ON:

THIS DATE 9-8-80

By: /s/ Shirley Miller
DEPUTY CLERK

Nos. 80-5303 and 80-5304

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

V.

O R D E R

CHARLES D. MARCUM (80-5303
KENNETH BREWER (80-5304)

Defendants-Appellants

_____/

Before: EDWARDS, Chief Circuit Judge;
ENGEL, Circuit Judge, and
HILLMAN, District Judge*

Charles D. Marcum and Kenneth Brewer were convicted following a jury trial in the United States District Court for the Eastern District of Kentucky of two counts of violating the Hobbs Act, 18 U.S.C. Section 1951. Indictments had charged the appellants with con-

spiring to extort money and attempting to accept a bribe in exchange for a guarantee that a certain construction company would receive contracts to be let by the Jackson County, Kentucky School Board outside of and in violation of legally required competitive bidding procedures.

In their direct appeals, appellants make the following claims of error:

(1) that their right to a fair trial was prejudiced when the prosecution introduced a tape recording from which eleven seconds had been deli-

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*Hon. Douglas W.Hillman,Judge, United States District Court for the Western District of Michigan, sitting by designation.

berately erased by agents of the Federal Bureau of Investigation, while defendnts' counsel were precluded from raising such issue through cross-examination of the agents in the presence of the jury;

(2) that there was insufficient evidence of interstate commerce to support the federal charges under the Hobbs Act;

(3) That they were entrapped as a matter of law by the conduct of the government informer and the government agents;

(4) That the district court erred in instructing the jury in relation to the burden of proof for the entrapment defense.

Appellant Marcum raises the additional issue that the trial court erred in denying his motion for directed acquittal on the ground that he had not been an employee or official of any state agency or instrumentality and cound not as a matter of law be found guilty of a violation of the Hobbs Act.

Of the issues raised, the most serious is that which challenges the propriety of the trial court's ruling excluding from jury consideration any reference to the erasures on the tape recording. The trial judge's ruling followed an extensive and searching evidentiary hearing outside of the presence of the jury. From the record, it appears that wihtout question the excised conversations between the government agents took place well after any conversations which the agents had had with the conspirators or any other witnesses. Equally

important, the record shows that the excised conversation did not relate to the criminal investigation itself, but was instead directed to inappropriate and personal references concerning another FBI agent.

While the government acknowledges that the better procedure would have been for the erasures not to have taken place and for the indiscretion to have been cured by other means which would have left the tapes at least intact for judicial scrutiny, the court is nevertheless of the opinion that the trial judge did not abuse his discretion in making his ruling. There was nothing in the record, including the conversations which immediately preceded and followed the excised portion, which might have led the jury to believe that exculpatory evidence had been deliberately suppressed.

It further appears that Marcum's assertion that he could not be guilty of a

violation of 18 U.S.C., Section 1951 because he was not a public official is without merit. The evidence showed that Marcum had conspired with Brewer who was such an official in the kickback scheme and had participated in it by lending his own political influence with the school board to the scheme.

The court finds no merit in the other assignments of error and accordingly.

IT IS ORDERED that the judgment of the district court in each appeal be and they are hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk